IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1379

CLIFFORD ARTHUR FORKERT

vs.

PEOPLE OF THE STATE OF CALIFORNIA

On Motion for a Writ of Certiorari to the Superior Court of the State of California for the County of Los Angeles, Appellate Department.

PETITION FOR WRIT OF CERTIORARI.

LESLIE A. KAST,
1500 West Covina Parkway,
West Covina, Calif. 91790,
(213) 962-6996,
Attorney for Petitioner.

EISCHEN & KAST, INC.,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Jurisdictional Statement	1
Questions Presented	2
Constitutional Provisions and Statutes	2
Statement of the Case	4
Reasons for Granting Writ	22
Prayer	27

INDEX TO EXHIBITS

Exhibit A. Order Affirming Judgment of the Municipal Court.

Exhibit B. Order Denying Rehearing and Denying Certification.

TABLE OF AUTHORITIES CITED

Page

Constitutional Provisions

United States Constitution, Fifth Amendment ..2, 3 .....22, 24, 27

United States Constitution, Sixth Amendment 3, 22, 27

United States Constitution, Fourteenth Amendment 3, 22, 24, 27

California Constitution, Art. I, Sec. 7 .....7, 12

Federal Statutes

United States Code, Title 28, Sec. 1257 2

Supreme Court Decisions

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 .....5, 7, 8, 12, 22, 23, 24, 27

Carney v. Cochran, 369 U.S. 506, 80 S.Ct. 884, 8 L.Ed.2d 70 6

Miranda v. Arizona, 384 U.S. 436 22

Supreme Court Rules

Rules of Supreme Court of United States, Rule 19.. 22

Rules of Supreme Court of United States, Rule 23.. 1

State Statutes

California Penal Code, Sec. 1469 10

California Penal Code, Sec. 1538.5 8

California Vehicle Code, Sec. 13352(c) 16

California Vehicle Code, Sec. 23102(a)(b), Misdemeanor Drunk Driving .....1, 2, 3 .....4, 5, 16

State Decisions	Page
Coffee, In re, 68 Cal.2d 769	6
Mills v. Municipal Court, Sup. 110 Cal.Rptr. 329	23, 24, 25, 26, 27
Neal v. State of California, 9 Cal.Rptr. 607, 55 Cal.2d 11	5
People v. Barnum, 147 Cal.App.2d 803, 305 P.2d 986	12, 13
People v. Coffee, 67 Cal.2d 204, 60 Cal.Rptr. 459	6
People v. Coleman, 71 Cal.2d 1159	6
People v. Evanson (1968) 265 Cal.App.2d 698, 71 Cal.Rptr. 503	13
People v. Foulger (1972) 103 Cal.Rptr. 156	9, 16, 25
People v. Holmes, 54 Cal.2d 442, 6 Cal.Rptr. 871, 353 P.2d 583	6
People v. Horak (1973) Appellate Department of Superior Court of the County of Santa Barbara, No. 97146, not reported	14, 15
People v. LoCicero, 71 Cal.2d 1186	6
People v. Shamrock, Inc. (1973) Appellate Department of the Superior Court of Los Angeles County, No. CRA 11881, not reported	13
Tahl, In re, 81 Cal.Rptr. 577, 1 Cal.3d 122, 460 P.2d 449, cert. den. 398 U.S. 911, 90 S.Ct. 1708, 26 L.Ed. 72	5, 7, 12, 13, 23
Thomas v. Department of Motor Vehicles, 3 Cal.3d 335, 90 Cal.Rptr. 586	5

State Regulations

California Administrative Code, Title 17, Sec. 1221.4 .....16, 17, 18, 19, 20, 21, 25

California Administrative Code, Title 17, Sec. 1222.2 .....16, 25

Department of Health, State of California, Secs. 436.50-436.63 16

Torrance City Ordinance No. 2361, Sec. 35.5.1 13

California Rules of Court

California Rules of Court, Rule 62(a) 26, 27

California Rules of Court, Rule 63(a)(c) 26

California Rules of Court, Rule 107(a)(b) 26

IN THE

Supreme Court of the United States

October Term, 1973
No. .....

CLIFFORD ARTHUR FORKERT

vs.

PEOPLE OF THE STATE OF CALIFORNIA

On Motion for a Writ of Certiorari to the Superior Court of the State of California for the County of Los Angeles, Appellate Department.

PETITION FOR WRIT OF CERTIORARI.

Pursuant to Rule 23 of the Supreme Court of the United States, the following information in support of this petition is submitted:

Jurisdictional Statement.

1. The Opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles is unreported in this case of Clifford Arthur Forkert v. People of the State of California, No. CR A 12082. A copy of that Opinion is attached and made a part hereof as Exhibit "A".

2. Judgment of Conviction was entered on December 7, 1972 by the Municipal Court of the Alhambra Judicial District in the County of Los Angeles, State of California for one count of violating Section 23102

(a) of the California Vehicle Code: Misdemeanor Drunk Driving. On Appeal to the Appellate Department of the Superior Court the Judgment was affirmed. The Judgment on Appeal issued on December 11, 1973, is unreported but attached as Exhibit "A" hereto. A petition for rehearing was filed December 17, 1973 and was denied December 28, 1973. A Copy of the Court's denial is attached as Exhibit "B". This Court has jurisdiction to review the Judgment of Conviction by a Writ of Certiorari pursuant to 28 U.S.C. 1257.

Questions Presented.

3. The following questions are presented for review:

(a) WAS THE TRIAL COURT'S DETERMINATION THAT THE PRIOR CONVICTION OF APPELLANT WAS CONSTITUTIONAL AGAINST THE DECISIONAL LAW OF THE SUPREME COURT OF THE UNITED STATES AND THE SUPREME COURT OF THE STATE OF CALIFORNIA?

(b) DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AT TRIAL AS A PROPER FOUNDATION WAS NOT ESTABLISHED BY THE PEOPLE?

Constitutional Provisions and Statutes.

4. The constitutional provisions involved in this petition are embodied in the following:

"AMENDMENT V, U.S. CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"AMENDMENT VI, U.S. CONSTITUTION:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

"AMENDMENT XIV, U.S. CONSTITUTION:
. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CALIFORNIA VEHICLE CODE SECTION 23102. MISDEMEANOR DRUNK DRIVING:

(a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway. Any person convicted under this

section shall be punished upon a first conviction by imprisonment in the county jail for not less than 30 days nor more than six months or by fine of not less than two hundred fifty dollars ($250) nor more than five hundred dollars ($500) or by both such fine and imprisonment and upon a second or any subsequent conviction, within seven years of a prior conviction, by imprisonment in the county jail for not less than five days nor more than one year and by a fine of not less than two hundred fifty dollars ($250) nor more than one thousand dollars ($1,000). A conviction under this section shall be deemed a second conviction if the person has previously been convicted of a violation of Section 23101 of this code.

(b) If any person is convicted of a second or subsequent offense under this section within seven years of a prior conviction and is granted probation, it must be a condition of probation that such person be confined in jail for at least five days but not more than one year and pay a fine of at least two hundred fifty dollars ($250) but not more than one thousand dollars ($1,000).

Statement of the Case.

5. Statement of the Case.

This Petition results from a Judgment of Conviction and Sentence in the Municipal Court of the Alhambra Judicial District on a one count complaint of violation of Section 23102(a) of the California Vehicle Code. The complaint was based on an arrest of appel-

lant on May 6, 1972 and stated that, before that arrest, appellant was convicted in the Municipal Court of the Whittier Judicial District on or about March 10, 1972 of violation of Section 23102(a) of the California Vehicle Code. (Clerk's Transcript, complaint; hereinafter referred to as C.T.).

On May 12, 1972, appellant was arraigned; appellant not being present but represented by counsel, pled not guilty to charge and did not waive trial by jury.

On August 4, 1972, appellant through counsel filed Notice of Motion to Strike Prior Conviction on Constitutional Grounds, Attorney's Declaration in Support Thereof and Points and Authorities. Said notice of motion, declaration and points and authorities are included in the Clerk's Transcript. That motion was denied on September 27, 1972 and again on December 6, 1972 at commencement of trial.

The trial court had the duty under *Thomas v. Department of Motor Vehicles,* 3 Cal.3d 335, 90 Cal. Rptr. 586, and *Neal v. State of California,* 55 Cal.2d 11, 16, 9 Cal.Rptr. 607, 609, to hear and determine the matter of the motion to strike prior conviction on constitutional grounds on its merits. Under *Boykin v. Alabama,* (1969) 395 U.S. 238, and *In re Tahl,* (1969) 1 Cal.3d 122, 81 Cal.Rptr. 577, the prior conviction is unconstitutional and in making its decision on September 27, 1972 (see docket sheet, Clerk's Transcript), the trial court failed to perform its duty when it failed to strike the prior. The *Boykin* and *Tahl* cases were cited to the trial court in the Motion to Strike and raised the federal issues:

> "A defendant may raise the validity of prior convictions which will effect his sentence in the trial

court where the subsequent action is heard. The following steps must be taken to deny a prior conviction:

1. Defendant must deny or move to strike prior offense.
2. Prosecution must prove prior offense.
3. Defendant has the burden to show cause why the prior conviction is invalid.
4. If defendant carries the burden, prosecution is entitled to rebuttal.
5. The court will make its findings based on the evidence as to the validity of the prior conviction.

People v. Coffee, 67 Cal.2d 204, 60 Cal.Rptr. 459;

In re Coffee, 68 Cal.2d 769, 773;

People v. Coleman, 71 Cal.2d 1159, 1169;

People v. LoCicero, 71 Cal.2d 1186, 1[illegible]

A defendant must personally waive his right to a jury trial in California.

People v. Holmes, 54 Cal.2d 442, 6 Cal.Rptr. 871, 353 P.2d 583.

6. While the prosecution may introduce official court records for the purpose of rebutting the defendant's testimony as to what went on at the court proceedings where the prior convictions were sustained, waiver may not be presumed from a silent record.

Carney v. Cochran, (1962) 369 U.S. 506, 8[illegible] S.Ct. 884, 8 L.Ed.2d 70.

7. Plea of guilty cannot stand unless record in some manner indicates free and intelligent

waiver of defendant's right against compulsory self-incrimination, right to trial by jury, and right to confront one's accusers and indicates an understanding of nature and consequences of plea, and judge must actively participate in canvassing matter with accused.

Waiver by counsel of a defendant's right to jury trial is not sufficient, and fact that accused was advised by counsel would not be sufficient to show waiver of right to jury trial. West's Ann. Const. Art. I, para. 7.

In re Tahl, (1969) 1 Cal.3d 122, 81 Cal.Rptr. 577.

As can be seen from the attached docket sheet, defendant was never present in court. The attorney appeared to enter guilty plea; but there was no canvassing on March 10, 1972, as set forth *In re Tahl,* (1969) 1 Cal.3d 122, 81 Cal.Rptr. 577, as the judge must personally canvass the defendant.

It does mean that the record must contain on its face direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea. Each must be enumerated and responses elicited from the person of the defendant. Because mere inference is no longer sufficient, the presence of an attorney cannot alone satisfy these requirements; as noted, the defendant in Boykin was represented by counsel.

In re Tahl, (1969) 1 Cal.3d 122, 81 Cal.Rptr. 577;

Boykin v. Alabama, (1969) 395 U.S. 238, 89 S.Ct. 1709.

Based upon the foregoing record, it would appear that since the defendant did not appear at any time, defendant has at no time been canvassed by a judge nor made aware of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea in person."

On September 27, 1972, the case was called for jury trial. On appellant Forkert's motion, the docket sheet in error refers to Motion to Strike Prior Conviction on Constitutional Grounds as follows, "proceedings proceed as to motion to suppress pursuant to Section 1538.5 Penal Code". People's exhibits received into evidence were a certified copy docket sheet, waiver of time and waiver of constitutional rights of the prior conviction in the Whittier case. The motion was denied.

On October 4, 1972, appellant filed in Department 70 of the Superior Court of Los Angeles County, State of California, a Petition for Writ of Mandate with Supporting Memorandum of Points and Authorities, No. C 40270. This Petition was for a writ requiring the trial court to grant the motion to strike the prior conviction on constitutional grounds.

On October 11, 1972, the Superior Court of Los Angeles County, State of California, acting by and through the Honorable Ernest Zack, denied petitioner's Petition for Writ of Mandate.

Thereafter, a Petition for Writ of Mandate was filed in the Court of Appeal, Second Appellate District, State of California on the same basis. That petition

was filed on November 13, 1972 as No. 2-CIV 41241 and denied on November 14, 1972.

On December 6, 1972, the case was called for trial by jury and assigned to the Honorable Ronald E. Swearinger. At the outset of the trial appellant renewed his motion to strike the prior conviction as constitutionally invalid. The motion was again denied [R.T. 3]. At the outset of trial and out of the presence of the jury, appellant made a motion to suppress evidence, pursuant to the case of *People v. Foulger*, (1972) 103 Cal.Rptr. 156 on the basis that the officer who administered the Breathalyzer test to appellant and the officers who maintained the machine were not the usual operators of the machine on which the test was administered as required by the regulations of the Department of Health, State of California, Sections 436.51-436.63 and the motion was denied after the court received testimony thereon [R.T. 4-26].

After a trial by jury, appellant was convicted as charged on December 7, 1972.

Sentencing occurred on December 18, 1972, after a motion for new trial, based on the trial court's error in not declaring the prior conviction invalid on constitutional grounds, which motion was denied. Sentence was imposed on the basis the prior conviction was valid. Appellant was sentenced, placed on three years' probation after the sentence was suspended on the following conditions:

1. Pay a fine of $350.00 plus a penalty assessment of $72.00;

2. Serve 6 days in the County Jail two days at a time on three consecutive weekends beginning February 2, 1973;

3. Surrender his driver's license in court for a period of one year (which was done);

4. Not operate a motor vehicle in the State of California unless he possessed a valid driver's license; and,

5. Obey all laws and all orders of the Court.

Appeal bond was set at $422.00 which was deposited on January 8, 1973. Notice of Appeal was timely filed on January 8, 1973. Notice to the Clerk to prepare Clerk's Transcript was filed on January 11, 1973. Notice of Appellant's proposed statement on appeal, etc., was also filed on January 11, 1973. Notice by Appellant of filing Reporter's Transcript as a part of the Statement on Appeal was duly served on January 26, 1973. The Statement on Appeal was settled and certified on March 22, 1973. The Record on Appeal was filed on May 25, 1973 and the time for filing Appellant's Brief established at June 8, 1973.

The denials of the appellant's motions by the trial court are reviewable on appeal, Section 1469 of the Penal Code of the State of California.

On appeal to the Appellate Department of the Superior Court of California for the County of Los Angeles the federal question was timely and properly raised in the Appellant's Opening Brief:

> "After several motions before the Court and two petitions for Writ of Mandate to have the prior conviction of appellant declared constitutionally invalid; the trial court found that conviction constitutionally valid (R.T. 147, lines 3-8). The trial court received in evidence People's Exhibit 4, which was a two page certified copy of

the docket sheet in case No. M80311 of appellant's conviction on the prior in Whittier Municipal Court (R.T. 149). People's Exhibit 4 is before this court by virtue of the Clerk's Transcript which designated the People's Exhibits as item 8 for the Record on Appeal.

The Court is referred to People's Exhibit 4 and its attention is directed to the docket entry dated January 20, 1972 covering the arraignment of appellant. That docket entry indicates appellant *was not present in court* when his plea of not guilty was entered. Accordingly, appellant did not hear the court's instruction that he was entitled to confront the witnesses against him; did not have to be a witness against himself; was entitled to a trial by jury and an attorney of his own choosing. Similarly he did not hear the court's instruction regarding the consequences of a guilty plea and accordingly did not respond. Appellant's counsel requested a jury trial.

The second docket entry relevant to this appeal is dated March 10, 1972 and reads as follows:

> '*Deft not appearing* Attorney David Baxley appearing D.D.A. George Palmer appearing *Atty with authority* enters guilty plea written waiver of jury, confrontation, self incrimination.' (Italics added).

The written waiver form referred to in that docket entry appears as Exhibit 6 to the Petition for Writ of Mandate to the Superior Court which was designated for inclusion in the Record on Appeal as item 4 of the Notice to Clerk to Prepare Clerk's Transcript. Reference to the written

waiver reveals that, *if efficacious,* it would waive the constitutional right to be represented by counsel; right to a speedy and public trial by a jury or court; right to be confronted by witnesses and to cross examine them; the right to testify in his own behalf or remain silent; and the privilege against self-incrimination. After each right, in the right hand column, are short spaces for the individual to initial and the form is initialed by appellant. That right hand column is headed with the words 'Deft initial after reading'. The form is signed by appellant and dated March 10, 1972. Appellant's signature is acknowledged by a Notary Public for Los Angeles County, on March 10, 1972. Appellant contends that this waiver *was not efficacious* under the constitutional and decisional law of the State of California and the United States of America and the conviction resulting therefrom is constitutionally invalid.

In *Boykin v. Alabama* (1969) 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709, the United States Supreme Court held it could not be assumed from a silent record that a guilty plea had been voluntarily made and that the constitutional rights necessarily forfeited by such a plea had been freely and intelligently waived.

It has long been the rule that section 7 of article I of the California Constitution requires the *actual speaking of words in open court by the defendant* clearly evidencing his waiver of right to a jury trial in order to effectuate such a waiver. (*In re Tahl* (1969) 1 C.3d 122, 131 (81 C.R. 577; 460 P.2d 449), cert. den., 398 U.S. 911 (90 S.Ct. 1708; 26 L. Ed. 72); *People v. Barnum*

(1957) 147 C.A.2d 803, 808 (305 P.2d 986).) *The waiver may not be made for defendant by his counsel or by inference, but requires the defendant's personal and verbal participation. People v. Evanson* (1968) 265 C.A.2d 698, 700-701, 71 C.R. 503; *People v. Barnum,* supra, 147 C.A. 2d at 809.

Nothing in the opinion in *Tahl, supra,* intimates that there can be a jury waiver without personal appearance and acquiescense of the defendant. To the contrary, the opinion states, at page 131:

> 'California law would seem to require some express courtroom statement by the accused and to preclude waiver by even the most redoubtable inference from the record.'

It seems clear from these cases that no amount of deduction or inferences, however compelling, will support a waiver of the Boykin-Tahl requirements under present California law. The waiver must be *expressed in words* by the Defendant in open court by responses *elicited from the person* of the defendant.

A recent decision from this Court in *People v. Shamrock, Inc.* (1973) Appellate Department of the Superior Court No. CR A 11881 .... C.A. .... is squarely in point. In that case the clerk's transcript demonstrated that on October 20, 1972, defendant corporation was arraigned on a charge of violating section 35.5.1 of Ordinance No. 2361 of the City of Torrance (the Municipal Code) by operating a public place where live entertainment is provided without a written permit; that defend-

ant pleaded not guilty and requested a trial by jury; that on November 21, 1972 defendant was in court with counsel, the cause was called for trial and was 'submitted on the arrest report for a guilty as to corporation'; that the court thereupon adjudged defendant guilty as charged and continued the case to November 29, 1972, for 'submission of written waiver of rights by corporation'; that on the latter date defendant was not in court but appeared by counsel; that there was then filed 'defendant's waiver of constitutional rights and personal presence per in re Tahl'; that defendant thereupon was sentenced to pay a fine, which sentence was suspended and defendant granted probation. The record was clear that although defendant expressly requested a jury trial the case was tried without a jury and without an effective waiver by defendant of its constitutional right to a jury trial.

> In reversing the lower court this court stated: 'The judgment must be reversed for failure of those responsible to turn the square corners required in jury waivers. This conclusion is reached reluctantly because of the waste of judicial time and public funds by the abortive trial. This kind of judicial contretemps, which occurs with unfortunate frequency, might be minimized if the trial courts could find the time, despite their overcrowded calendars, to administer more precisely the procedural aspects of the daily courtroom load.'

To the same effect see *People v. Horak* (1973) Appellate Department of Superior Court of the County of Santa Barbara, No. 97146 .... C.A. .....

In the *Horak* case the court addressed the import of a written waiver and declared it ineffective in the following words:

> 'If the written waiver could be accepted at face value the order appealed from could be affirmed. We do not believe that it can be. Our interpretation of the cases leads us to the conclusion that a written waiver, standing alone, does not satisfy their strict requirements and that there must be, in addition, an orally enunciated waiver from the lips of the accused, or, at the very least, a statement from the mouth of the defendant that he has read the waiver form. Anything less than that requires the court to infer, deduce, and speculate, which is forbidden. *Appellant does not say in the waiver form that he has read it, he did not say in court that he had read it, and people do sign documents without reading them.*' (Italics added).

Based on the docket sheet entries in the prior conviction, Case No. 80311, it is clear that since the appellant did not appear in Court at anytime, appellant was at no time canvassed by the judge nor made aware of his right of confrontation, *right to a jury trial,* and his privilege against self-incrimination, as well as the nature of the charge and the consequences of his plea, in person. Given this record, it seems clear under the authorities cited above that the prior conviction was constitutionally invalid and the trial court failed to perform its duty when it denied appellant's Motion to Strike Prior Conviction on Constitutional Grounds. The trial court's failure to grant the motion results in increased sanctions flowing from his present con-

viction since the court is required under California Vehicle Code 23102(b) to impose a minimum five day mandatory jail sentence; and the Department of Motor Vehicles is mandatorily required to suspend appellant's driver's license for one year under California Vehicle Code 13352(c). Accordingly, appellant respectfully requests this Court to reverse the lower court's order denying the motion."

Petitioner also contended in his appeal that the trial court erred in denying his motion to suppress evidence of the breathalyzer test administered Appellant and in receiving the evidence at trial without a proper foundation being established by the People:

"Since the decision of this Court in *People v. Foulger* (1972) 103 C.R. 156, it is settled law that the People must show compliance with the law, as part of the foundation for admissibility in evidence of the results of Breathalyzer tests in drunk driving cases. At the outset of trial appellant made a motion to Suppress the Results of the Breathalyzer Test administered to appellant. A hearing on that motion was held outside the presence of the jury. The issue at the hearing was whether the administering officer was a usual operator within the meaning of Section 1221.4 and 1222.2 of Title 17, Administrative Regulations of the Public Health Department adopted pursuant to Sections 436.50 through 436.63 of the Health and Safety Code of the State of California (R.T. 4-5).

When the people offered Exhibits 1, 1-A, 2 and 3 into evidence, appellant objected to their receipt on the basis that Instrument 18 was not

properly calibrated and maintained; and that the officer who administered the test was not a 'usual operator' within the meaning of 1221.4(b). This objection was overruled (R.T. 140-144, lines 1-14).

The arresting officer and the same one who administered the test, testified that he used Instrument No. 18 located at the Los Angeles County Main Jail and an ampule from batch 685 in administering the test to appellant on May 6, 1972. He possessed and showed a certificate No. 288 from the California Highway Patrol certifying that he had been trained and had demonstrated competence in the operation of the Breathalyzer. The document was dated November 26, 1968. He could not recall whether he had used Instrument 18 previously, although he stated he had used identical instruments about 2,000 times (R.T. 5-8). At the trial in December he testified that in the entire year of 1972 he had only administered two such tests including the one administered to appellant.

A Mr. J. Raymond Wells testified that he had calibrated Instrument 18 on May 1, 1972 when it was returned to service as a rebuilt unit and again on May 12, 1972. He testified that he had nothing to do with the 'usual operator'. The Regulations, Section 1221.4(b) require the instrument be maintained by testing of unknown samples, either weekly or following every 100 tests of subjects, *whichever comes sooner,* by a usual operator of the instrument, with reports of such tests made to the licensed Forensic Alcohol laboratory which maintains the instrument. Certainly the calibrations on May 1, 1972 and on May 12, 1972 can-

not satisfy the *weekly* requirements of Section 1221.4 (R.T. 9-10, 18).

Mr. Wells testified that on May 5, 1972, an unknown *sample* was run on Instrument 18 by a Deputy Shinn, Badge No. 4168 and the analysis was and should have been .11 percent blood alcohol. He testified further that on May 10, 1972, a Deputy Failes, Badge No. 3744 ran an unknown sample on Instrument 18 and after analysis it tested and should have tested .13 percent blood alcohol (R.T. 12). Section 1221.4(a) requires these instruments to be *calibrated* and maintained periodically by persons who qualify as Forensic Alcohol Supervisors or Forensic Alcohol Analysts in a licensed Forensic Alcohol Laboratory. Section 1221.4(b) requires *maintenance* tests by the usual operator on unknown *samples* at a minimum of weekly. Section 1221.4(c) requires the operators to have received training in the use of the instrument! From the preceding it is clear that a proper foundational basis for receipt of the Breathalyzer test results in evidence was not laid by the people.

Mr. Wells met the requirements to maintain and calibrate the instrument under Section 1221.4(a) and a licensed Forensic Alcohol Supervisor; (R.T. 9), however, his calibrations on May 12, 1972 did not satisfy the weekly maintenance requirements of Section 1221.4(b). Deputy Shinn's maintenance testing on May 5, 1972, is defective for several reasons: (1) Section 1221.4(b) requires that unknown *samples* shall be run weekly. Shinn only ran one *sample;* not the requisite plurality of at least two; (2) There is no showing in the record that Shinn was a 'usual operator' as re-

quired under Section 1221.4(b). The record is void as to whether Shinn had ever ran a test on such an instrument previously; (3) There is no showing in the record that Shinn was qualified by training to conduct analysis on Breathalyzer instruments as required by Section 1221.4(c) or that he was qualified by virtue of the 'grandfather' provision of 1221.4(c)(5).

The same defects are present in the maintenance test conducted by Deputy Bailes. He was not qualified by training or experience; he ran a single test; and he was not a usual operator because he was not qualified (R.T. 12).

The reasonable import of Sections 1221.4(a), (b) and (c) when read together is that maintenance of the instrument must be accomplished by a 'usual operator' on a not less than weekly basis; and, that *samples,* not a *sample* must be tested for adequate maintenance. Furthermore, the usual operator must be qualified under 1221.4 (c). One cannot infer that the term *samples* was an inadvertent choice of words in Section 1221.4 (b). More than one sample reduces the error element and increases the reliability that the machine has adequately measured the blood alcohol content. (R.T. 166, lines 5-16). Since the people did not show that Instrument 18 had been calibrated and maintained in accordance with the requirements of the Health and Safety Code and Regulations issued thereunder, the trial court erred in denying appellant's motion to suppress (R.T. 26 and 140-144, lines 1-14).

Reading of the regulations indicates an overall intent that maintenance testing be accomplished by a 'usual operator'. The term 'usual operator'

is not defined in the regulations; however to be an 'operator' for analysis testing under Section 1221.4 (c) a person must be trained, or qualified by the 'grandfather' provision of Section 1221.4(c)(5). When the term 'usual' is utilized to modify operator we must look to the common ordinary meaning attributed to the word to gain the intention. A common dictionary definition of the term 'usual' is 'habitual or customary'. Accordingly what Section 1221.4(b) means when it uses 'usual operator' is that the operator be the 'habitual or customary operator'. This reflects a clear intention that instruments in a certain location would be used over and over again by the same people and that maintenance testing would test *not only the machine but also the operator.* Thus indirectly, the regulations contain a built in verification test of the operator's continued proficiency gained as a result of training and experience under 1221.4(c)! The testimony of People's witness Mr. Wells supports this conclusion (R.T. 131). By Officer Armenta's own testimony he couldn't recall whether he had ever used Instrument 18 previously. (R.T. 8). At the time of trial he testified that he had only conducted two tests in the eleven months of 1972 that had expired. The People stipulated that Officer Armenta was not a 'usual operator' (R.T. 26). Mr. Wells testified that Officer Armenta did not appear as a 'usual operator' in his records covering the period from April 7, 1972 to August 2, 1972 (R.T. 17).

By the analysis developed above, the Regulations require the 'usual operator' of an instrument to be periodically tested on the Instrument; Section

1221.4(b). Certainly this carries a reasonable implication that random operation of the machine is not contemplated or permissible under the Regulations. Officer Armenta's test of appellant on May 6, 1972 can only be characterized as random. The reasonable interpretation of the Regulation reveals an overall intent that suspects be tested on a calibrated machine, by a proficient test operator maintaining his skill by current, repetitive operation of the same instrument if the results were to be admissible as evidence against the accused. Verification of skill maintenance was to come from maintenance testing of not only the machine but the usual operator also.

Since the record reveals the Regulations were not complied with in this case, the Motion to Suppress People's Exhibits 1, 1-A, 2 and 3 should have been granted.

While there was other evidence presented on the issue of whether the appellant was or was not under the influence of intoxicating liquor, the result of the Breathalyzer test was a significant, if not the most significant, part of the People's case. Enhancing the significance of the Breathalyzer test is the Jury Instruction given from CALJIC 16,834 Drunk Driving—Presumption of Intoxication (C.T.—Docket sheet, page 5). Appellant's test result was .16 percent blood alcohol while the instruction invokes the presumption of only .10 percent.

Accordingly, appellant respectfully requests the judgment of the court below be reversed."

REASONS FOR GRANTING WRIT.

Pursuant to Rule 19 of the rules of this Court Petitioner believes a review of this case is in order to resolve substantial federal questions, based on loss of liberty without due process under Amendments V and XIV of the U.S. Constitution and denial of effective assistance of Counsel under Amendment VI of the U.S. Constitution, were raised by the manner in which the Courts below disposed of his motions at trial and his appeal and the basis on which said disposition was made.

Petitioner contends that his prior conviction was constitutionally invalid because he did not appear in court for either his arraignment at which his Counsel entered a not guilty plea in his behalf and therefore was not advised of his constitutional rights; or at the subsequent proceedings where Counsel entered a guilty plea on his behalf and a written waiver of his constitutional rights purportedly signed by him, in his absence. Petitioner contends that the disposition of his case in the Courts below resulted in a state court deciding a federal question of substance in a way probably not in accord with applicable decisions of this Court in the cases of *Boykin v. Alabama,* (1969) 395 U.S. 283, 23 L.Ed.2d 274, 89 S.Ct. 1709; and *Miranda v. Arizona,* 384 U.S. 436.

In the *Boykin* case, *supra,* this Court held a conviction could not stand by assuming from a silent record that a guilty plea had been voluntarily made and that the constitutional rights necessarily forfeited by such a plea had been freely and intelligently waived. Similarly, *Miranda, supra,* dealt with the waiver of the constitutional privilege against self-incrimination. This Court

held in that case that a waiver of constitutional privileges could not be effectuated by means of a printed form signed by the accused, even though the form recited that he had been fully advised of all his rights and understood them.

In reaching its decision, the Appellate Department undoubtedly relied *erroneously* on the October 1973 decision of the California Supreme Court in the case of *Mills v. Municipal Court,* Sup., 110 Cal.Rptr. 329, which distinguished waiver *procedures* required in felony proceedings from those obtaining in misdemeanor proceedings, such as involved here, after a careful analysis of the *Boykin-Tahl* decisions:

> "5. Conclusion.
>
> To reiterate, we have concluded above that the principles underlying the Boykin-Tahl decisions are applicable to misdemeanor proceedings. We have also indicated that in implementing these principles in the misdemeanor field, the procedure required for felony prosecutions need not be precisely duplicated, but variations may be adopted so long as defendants' fundamental constitutional rights are respected. In particular, we have explained that the application of the Boykin-Tahl rule does not preclude the entry of a guilty plea through counsel, so long as the record explicitly demonstrates the defendant's awareness, and personal waiver, of the constitutional rights relinquished by his plea of guilty. Moreover, we have also recognized that when misdemeanor defendants personally appear in court to enter their pleas, the trial judge may collectively advise such defendants of their constitutional rights so long as ade-

quate evidence of each defendant's personal waiver appears on the record. *Finally, we have held that our present decision is to be applied purely prospectively.*" (Italics added).

By its terms, the *Mills* decision was to be applied purely prospectively, that is, only to guilty pleas entered after the date of the decision. As the guilty plea at issue was made before the *Mills* decision, the full thrust of the *Mills* decision is to *negate the effect* of this Court's decision in *Boykin,* insofar as its safeguards were to have been applied to misdemeanor convictions obtained in California during the period from *Boykin* to *Mills* (1969-1973), therefore denying adequate protection of federal constitutional rights of the accused. Such State action is proscribed by Amendment XIV, U.S. Constitution, and protected by Amendment V of the U.S. Constitution. Accordingly, petitioner respectfully requests this Court to review the matter to determine whether *Boykin* should be reinstated in California for application to misdemeanor convictions in the period from 1969 to 1973, *Boykin* to *Mills.*

Secondly, petitioner seeks review of the procedural defect that resulted in his being denied the opportunity to argue the merits of his case through counsel before the Appellate Department. A hearing on the appeal was set for July 12, 1973 and petitioner's Counsel was present when the case was called for argument. The decision on the *Mills* case was then pending and Counsel for Respondent suggested deferment of argument until the *Mills* case was decided and this was concurred in by petitioner's Counsel and the Court. The *Mills* decision occurred in October of 1973 and a new hearing date was never set. Rather, the Appellate Depart-

ment issued its decision denying the appeal on December 11, 1973 without hearing argument from Counsel [Ex. A].

Petitioner then filed a timely Petition for Rehearing and an Application for Certification to the District Court of Appeal for the Second Appellate District of the State of California:

> "Appellant in the above-entitled appeal on which a decision was rendered and entered on December 11, 1973, and received by appellant on December 12, 1973, respectfully requests a rehearing and application for certification to District Court of Appeal, and that said decision be reversed on the following grounds:
>
> 1. The hearing on the appeal was set by the court for July 12, 1973 at 9:30 A.M. At said hearing the parties agreed that this case would be held to be argued and then submitted upon the court receiving the decision in the case of *Mills v. Municipal Court,* Sup., 110 Cal.Rptr. 329. Appellant understood that upon receiving the *Mills* decision this case would be reset on calendar and counsel would be permitted to argue prior to submission (a) the point in the *Mills* case and (b) the point in the case of *People v. Foulger* (1972) App., 103 Cal. Rptr. 156, 26 Cal. App.3d Supp. 1, and the *California Administrative Code,* Title 17, Sections 1222.2, 1221.4, (a), (b) and (c), as presented in his Brief. Counsel understood that argument would be permitted after the *Mills* decision and Appellant did not rely on *Mills;* it was the Respondent who requested deferment of argument *subsequent* to *Mills* decision and

Appellant concurred. It should be noted that *Mills* applies prospectively only by its own terms, Sup., 110 Cal.Rptr. 332, 343-345.

2. *California Rules of Court,* Rule 107(a) permits the court to order a rehearing at any time before the appellate department's judgment becomes final. The judgment in the instant appeal will not become final pursuant to (b) (1) until the expiration of seven days after its pronouncement and is stayed by this petition for rehearing, which is timely filed.

3. If a rehearing is not granted or the court feels it cannot change its position, we request based on the above, that in accordance with the *California Rules of Court,* Rule 63(a) and (c) that this court certify this case to the District Court of Appeals for appellate review.

WHEREFORE, appellant respectfully submits that this petition for rehearing be granted, and that this cause be reset for argument thereon; or that the court certify the matter to the District Court of Appeal.

Dated: December 17, 1973."

This petition and the application for certification were denied December 28, 1973 [Ex. B]. An appeal to the Court of Appeal does not lie unless the Appellate Department certifies transfer or the Court of Appeal on its own motion determines to transfer from an opinion of the Appellate Department published or to be published (no such opinion was written here) in Advance California Appellate Reports, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law. California Rules

of Court 62(a). Since neither condition exists in petitioner's case, the judgment of the Appellate Department, the denial of a rehearing and the denial of certification make the Appellate Department's decision that of a State Court of last resort as to petitioner.

Petitioner contends that the Appellate Department's refusal to set his case for oral argument constitutes a denial of due process under Amendments V and XIV of the U.S. Constitution and denied him the effective assistance of Counsel guaranteed by Amendment VI, U.S. Constitution. As shown in the Statement of the Case; *supra;* the *Boykin* issue was not the only issue raised on appeal. Conceding, *arguendo* only, that *Mills* may have been dispositive of the *Boykin* issue; it is clear that *Mills* had no applicability and did not address the issue of whether the Breathalyzer test results should have been suppressed at trial. As a minimum, petitioner should have been accorded the right to argue his position on that issue in the Appellate Department before judgment or on timely petition for rehearing. This right was denied petitioner by the lower Court's action.

Prayer.

For the reasons stated above, petitioner prays the writ will issue.

Dated: March 8, 1974.

LESLIE A. KAST,
Attorney for Petitioner.

EISCHEN & KAST, INC.,
Of Counsel.

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 12082

Trial Court No. M 62755

FILED

DEC 11 1973

CLERK, Superior Court

BY L. SMITH, DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

CLIFFORD ARTHUR FORKERT,
Defendant and Appellant.

ON APPEAL
from the
MUNICIPAL COURT
of the
Alhambra
Judicial District,
County of Los Angeles,
State of California.
Ronald E. Swearinger, Judge
(23102(a) VC)

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the Judgment made and entered in the Municipal Court of the Alhambra Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

BY THE COURT DEC 11 1973

Presiding Judge.

Judge.

sd

FILED

DEC 28 1973

CLARENCE [illegible], County Clerk

BY L. SWAIN, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. CLIFFORD ARTHUR FORKERT, Defendant and Appellant.	Superior Court No. CR A 12082 Municipal Court of the Alhambra Judicial District No. M 62765 ORDER DENYING REHEARING AND DENYING CERTIFICATION

The petition of appellant for a rehearing after judgment of this court on appeal and petition for certification of cause to the Court of Appeal in the above-entitled case having been filed and having been duly considered,

Said petitions are hereby denied.

Dated DEC 28 1973

BY THE COURT

Presiding Judge

Judge